

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of)
)
)
ENTERGY NUCLEAR GENERATION)
COMPANY and ENTERGY NUCLEAR) Docket No. 50-293-LR
OPERATIONS, INC.)
)
(Pilgrim Nuclear Power Station))
)

)

CLI-12-10

MEMORANDUM AND ORDER

This long-pending proceeding stems from the application of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (together, Entergy or Applicant) to renew the operating license for the Pilgrim Nuclear Power Station for an additional 20 years beyond the current license expiration date of June 8, 2012. Before us is intervenor Pilgrim Watch's petition for review of LBP-11-20, an Atomic Safety and Licensing Board decision rejecting Pilgrim Watch's requests for hearing on three new contentions.¹ Entergy and the NRC Staff oppose the petition for review.² For the reasons set forth below, we deny review.

¹ See *Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing On Certain New Contentions)* ASLBP No. 06-848-02-LR, August 11, 2011 (Aug. 26, 2011) (Petition); LBP-11-20, 74 NRC ____ (Aug. 11, 2011) (slip op.).

² See *Entergy's Answer Opposing Pilgrim Watch's Petition for Review* (Sept. 6, 2011) (Entergy Brief); *NRC Staff's Answer to Pilgrim Watch's Petition for Review of Memorandum and Order* (continued . . .)

I. BACKGROUND

This highly contentious proceeding has spanned nearly 6 years of litigation. The procedural history has been described in detail in recent Board decisions, and we do not repeat that full history here.³ Below we outline the background most relevant to our decision today.

The Board originally admitted Pilgrim Watch as an intervenor in 2006, granting a hearing on two contentions: Contention 1, a safety contention challenging Entergy's aging management program (AMP) for buried piping; and Contention 3, an environmental contention challenging the Severe Accident Mitigation Alternatives (SAMA) analysis in Entergy's Environmental Report.⁴ Subsequently, the Board granted summary disposition of Contention 3.⁵ The Board went on to hold an evidentiary hearing on Contention 1. Following the hearing, the Board ruled in favor of Entergy, and terminated the proceeding.⁶

Pilgrim Watch petitioned for Commission review of the Board's merits decision on Contention 1 (buried piping), the dismissal on summary disposition of Contention 3 (SAMA analysis), and numerous Board interlocutory orders. We partially reversed the dismissal of Contention 3, remanding a limited portion of the contention to the Board.⁷ We denied review of the other challenged Board decisions.⁸

While the limited remand before the Board was pending, Pilgrim Watch filed the three new contentions that the Board rejected in LBP-11-20. The first of these three new contentions

(Denying Pilgrim Watch's Requests for Hearing On Certain New Contentions) (Sept. 6, 2011) (Staff Brief).

³ See, e.g., LBP-11-18, 74 NRC __, __ (July 19, 2011) (slip op. at 2-8).

⁴ See LBP-06-23, 64 NRC 257, 348-49 (2006).

⁵ See LBP-07-13, 66 NRC 131, 137 (2007).

⁶ See LBP-08-22, 68 NRC 590, 610 (2008).

⁷ See CLI-10-11, 71 NRC 287 (2010), *reconsideration denied*, CLI-10-15, 71 NRC 479 (2010).

⁸ See CLI-10-14, 71 NRC 449 (2010).

was a new challenge to the Pilgrim SAMA analysis.⁹ Because the contention raised claims regarding the “cleanup” or decontamination following a potential severe nuclear reactor accident, the Board referred to this as the “Cleanup Contention.” The second contention challenged Entergy’s AMP for non-environmentally qualified inaccessible cables at the Pilgrim Nuclear Power Station.¹⁰ The third contention was nearly identical to the second, but challenged Entergy’s AMP for non-environmentally qualified inaccessible cables “*as amended by Entergy on January 7, 2011.*”¹¹ The Board referred to the two cable-related contentions as “Cables Contention 1” and “Cables Contention 2.” In LBP-11-20, the Board rejected all three contentions.

Pilgrim Watch’s petition for review suggests that we address only the Board’s conclusions on the Cleanup Contention and Cables Contention 2.¹² Pilgrim Watch states that “the allegations in [Cables Contention 1] have in effect been superseded by those in [Cables Contention 2],” given that the amended AMP “has effectively replaced” the AMP submitted with the original license renewal application.¹³ Because Pilgrim Watch’s petition for review focuses only on the Cleanup Contention and Cables Contention 2, we confine our decision accordingly.

⁹ *Pilgrim Watch Request for Hearing on a New Contention* (Nov. 29, 2010) (Cleanup Contention).

¹⁰ See *Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy’s Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station* (Dec. 13, 2010) (Cables Contention 1).

¹¹ See *Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy’s Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station* (Jan. 20, 2011), at 1 (Cables Contention 2) (emphasis in original). Pilgrim Watch included as an attachment to Cables Contention 2 the Affidavit of Paul M. Blanch (Jan. 19, 2011) (Blanch Affidavit).

¹² See Petition at 2.

¹³ *Id.*

II. DISCUSSION

A. Contention Standards

To be accepted for hearing, contentions must meet our strict admissibility standards under 10 C.F.R § 2.309(f)(1). These standards are designed to help assure that adjudicatory hearings will be meaningful—that is, focused on matters that have genuine underlying factual or legal support, and that fall within the scope of a renewal proceeding, raising a material dispute with the application. Our process demands that petitioners carefully review the license renewal application and raise all their distinct challenges at the outset, avoiding piecemeal supplemental contentions unless they could not have been raised earlier. Contentions submitted after the deadline for initial intervention petitions must satisfy the standards for late-filed contentions.¹⁴ And where a Licensing Board has closed the evidentiary record, intervenors seeking to have new evidence admitted must demonstrate sufficient grounds for reopening the record.¹⁵ “Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.”¹⁶

Our rules provide a balance, allowing for late-filed contentions based on genuinely new information, yet at the same time helping to assure an efficient, focused hearing process. We long have stressed that our proceedings would be incapable of attaining finality if contentions—that could have been raised at the outset—could be added later at will, regardless of the stage of the proceeding.¹⁷ Nonetheless, our rules on new or amended contentions are not intended to sweep away any genuine safety matter that may be identified later in a proceeding. Even where

¹⁴ See 10 C.F.R. § 2.309(f)(2).

¹⁵ See 10 C.F.R. § 2.326.

¹⁶ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008) (citation omitted).

¹⁷ See, e.g., *Louisiana Energy Services, LP* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 727-28 (2005).

an intervenor does not satisfy the contention standards, we can direct the Staff, outside of the adjudicatory process, to address any safety matter that warrants further inquiry. In addition, our § 2.206 petition process can respond to claims of regulatory violations.

We may grant a petition for review at our discretion, giving due weight to whether there exists a “substantial question” regarding the following considerations:

- (1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (3) A substantial and important question of law, policy, or discretion has been raised;
- (4) The conduct of the proceeding involved prejudicial procedural error; or
- (5) Any other consideration which the Commission may deem to be in the public interest.¹⁸

We generally defer to Board rulings on contention admissibility unless we find “an error of law or abuse of discretion.”¹⁹ We have carefully considered Pilgrim Watch’s petition. As we discuss below, the petition does not identify any Board error of law or abuse of discretion, or other reason warranting review of LBP-11-20.

B. Cleanup Contention

Pilgrim Watch’s Cleanup Contention challenged the Pilgrim SAMA analysis. The SAMA analysis is a mitigation alternatives analysis under the National Environmental Policy Act (NEPA). The requirement for license renewal applicants to consider severe accident mitigation alternatives stems from our environmental regulations.²⁰ We described the nature of the

¹⁸ 10 C.F.R. § 2.341(b)(4)(i)-(v).

¹⁹ See, e.g., *South Carolina Electric and Gas Co. & South Carolina Public Service Authority (also referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-21, 72 NRC 197, 200 (2010) (citing *Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska)*, CLI-09-9, 69 NRC 331, 336 (2009)).

²⁰ See 10 C.F.R. § 51.53(c)(3)(ii)(L).

analysis in earlier decisions in this proceeding.²¹ Our discussion here focuses on the Board's reasoning in rejecting the Cleanup Contention and Pilgrim Watch's arguments in seeking review.

Pilgrim Watch's Cleanup Contention read as follows:

Until and unless some third party assumes responsibility for cleanup after a severe nuclear reactor accident to pre-accident conditions, sets a cleanup standard, and identifies a funding source, Entergy should be required to take all of the mitigation steps that would be required by a SAMA analysis (i) based on a conservative source term using release fractions no lower than those specified in NUREG-1465 or used by the NRC in studies such as NUREG-1450, cleanup to a dose rate of not more than 15 millirem a year, and at least the 95th percentile of the total consequences determined by the EARLY and CHRONC modules of the MACCS2 Code, and (ii) [that] does not reduce any costs by use of a discount factor or probabilistic analysis.²²

Pilgrim Watch claimed that it had learned from a November 2010 article in *Inside EPA* that "neither the NRC, nor EPA [Environmental Protection Agency], nor FEMA [Federal Emergency Management Agency] is responsible for cleanup" of a nuclear reactor accident; that "the cleanup standards that will determine what cleanup is required (and hence its cost) have not been defined"; and further that "no funding source has been identified."²³ The cited article (attached to the contention) refers to discussions between the three agencies regarding "which agency—and with what money, and legal authority—would oversee cleanup in the event of a large-scale accident."²⁴ These included discussions regarding whether funds collected under the Price-Anderson Act would be available to pay for decontamination costs, whether "EPA can assert its Superfund authorities over" cleanup of a nuclear power plant accident, and what

²¹ See, e.g., CLI-10-11, 71 NRC at 291, 316; CLI-12-1, 75 NRC __, __ (Feb. 9, 2012) (slip op. at 2-4, 18-19).

²² Cleanup Contention at 1.

²³ *Id.* at 2.

²⁴ *Id.* at 16 (Attachment A, "Agencies Struggle to Craft Offsite Cleanup Plan for Nuclear Power Accidents," *Inside EPA*, Nov. 22, 2010). Our decision today should not be read to intimate an opinion on the accuracy of any specific statements in the referenced article.

cleanup standards would apply.²⁵ Pilgrim Watch attached numerous agency e-mails obtained by *Inside EPA* relating to these inter-agency discussions.

Pilgrim Watch further claimed that “nothing in . . . NRC policy” on conducting the NEPA SAMA analysis “places the responsibility for actual cleanup on the licensee; neither does it require the licensee” to implement potential cost-beneficial measures identified in the analysis.²⁶ Pilgrim Watch went on to claim that the “only . . . potential justification for this NRC policy is the unspoken assumption that someone other than the licensee is responsible for cleanup.”²⁷ As Pilgrim Watch’s argument goes, “[u]ntil this is resolved—who is in charge, who pays, and what are the cleanup standards—Pilgrim’s license renewal should not go forward” unless the SAMA analysis is redone using the particular inputs and methodology proposed by Pilgrim Watch in the contention, *and* “Entergy is required to take all of the mitigation steps” that may be identified by this alternate SAMA analysis.²⁸

The Board rejected the Cleanup Contention on several grounds. One, the Board found that the issues raised in the *Inside EPA* article were “policy matters that are solely within the jurisdiction of the Commission,” and therefore fall outside the scope of the license renewal proceeding.²⁹ Two, the Board found that the technical concerns raised in the contention could and therefore should have been raised earlier in the proceeding.³⁰ And three, the Board found

²⁵ *Id.* at 16-19.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ See *id.* at 6. Presumably, in referring to “mitigation steps” Pilgrim Watch means cost-beneficial mitigation alternatives. The SAMA analysis examines an extensive range of potential mitigation alternatives, many of which are found not to be cost-beneficial to implement.

²⁹ LBP-11-20, 74 NRC at ___ (slip op. at 19).

³⁰ See *id.* at ___ (slip op. at 20 n.93).

that the contention failed to meet the standards for reopening the evidentiary record.³¹ Pilgrim Watch does not identify error in these conclusions.

Determinations regarding the precise role and relative authority of each relevant agency in the event of a severe reactor accident, and statutory interpretations going to sources of funding for decontamination efforts, do not fall within the scope of an individual license renewal proceeding. As the Staff states, these are not matters “susceptible to[] resolution in an NRC hearing.”³² Contentions for adjudicatory hearings must raise a genuine dispute “with the applicant/licensee on a material issue of law or fact.”³³

Pilgrim Watch argues, however, that the Board misunderstood its contention, and that it was not challenging “policy matters.”³⁴ Pilgrim Watch claims that it raises a NEPA contention challenging Entergy’s SAMA analysis, a matter within the scope of a license renewal proceeding.³⁵ But the *Inside EPA* article and attached e-mails lend no support to Pilgrim Watch’s claim that the Pilgrim SAMA analysis must be redone, much less that it requires redoing using the inputs or methodology outlined in the contention. Nothing in the *Inside EPA* article or other attachments even mentions source terms, discount factors, accident consequence values, or probabilistic analysis. In short, Pilgrim Watch demonstrated no direct link between the inter-agency discussions alluded to in the *Inside EPA* article and the aspects of the NEPA mitigation analysis that Pilgrim Watch seeks to challenge. The article and attachments do not call into question the adequacy of the Pilgrim SAMA analysis.

³¹ See *id.* at ___ (slip op. at 17, 20-21).

³² Staff Brief at 15.

³³ See 10 C.F.R. § 2.309(f)(1)(vii).

³⁴ See Petition at 22.

³⁵ *Id.* at 23.

Pilgrim Watch therefore fails to provide the necessary minimal basis and factual or expert support for its SAMA analysis challenge. To the extent that the Board did not reach the question whether the contention satisfies the contention requirements in 10 C.F.R. § 2.309(f)(1), we find, based on the record before us, that it does not. We elaborate further below.

The SAMA analysis is a NEPA mitigation alternatives analysis, examining various categories of hypothetical severe accidents (e.g., accident sequences) to identify potential measures that could be taken by licensees to further reduce severe accident risk. The analysis is not directed to, and does not rely upon, the relative roles different agencies may take following a potential actual accident, or the funding sources for any actual decontamination effort. Indeed, in the event of an actual accident, many inter-agency determinations may need to be based on the nature of the specific accident or on other real-time information and considerations.

The SAMA analysis does assume some level of maximum allowable long-term radiological dose, as a basis for determining whether particular levels of decontamination efforts would be sufficient to achieve the dose criteria and would be cost-efficient to pursue. If it would be more cost-efficient, for example, to outright condemn contaminated land, then the analysis would account for the cost of the condemned land instead of the cost to decontaminate it.³⁶

Here, Pilgrim Watch claims that if EPA “is in charge [of cleanup efforts] there will be a more conservative cleanup standard.”³⁷ But Pilgrim Watch nowhere addresses or otherwise challenges the cleanup dose rates that were used in the Pilgrim SAMA analysis, which *are*

³⁶ See, e.g., “Code Manual for MACCS2: User’s Guide,” NUREG/CR-6613 (Vol. 1 May 1998) (ADAMS accession no. ML063550020) at 7-3 to 7-4, 7-8 (MACCS2 User’s Guide) (if it “is not possible to reduce doses” to the maximum allowable, “the property is condemned and the resident population is permanently relocated”).

³⁷ Petition at 24.

based on EPA—not NRC—standards.³⁸ Pilgrim Watch merely describes how there are different potential “cleanup” standards among the agencies, some more stringent, some less so. It states, for example, that “potential standards appear to range from” 15 millirem/yr to 5 rem/yr.³⁹ But Pilgrim Watch provided no support for any suggestion that the long-term dose standard used in the Pilgrim SAMA analysis was not a reasonable choice among options, particularly where neither current law nor practice establishes one definitive “cleanup” standard for all severe reactor accidents.

Notably, the SAMA analysis involves extensive predictive judgments, many reflected in the computer modeling inputs used in the analysis. That there may be a range of conceivable choices among inputs used in the SAMA analysis goes without saying, and many alternative inputs may be reasonable choices—reflecting reasonable predictions—even though some may be more conservative and others less so. A NEPA mitigation alternatives analysis need not reflect the most conservative—or worst case—analysis.⁴⁰ There always will be myriad alternate ways a NEPA analysis could have been done. While proposing its own preferred inputs or methodology for the SAMA analysis, Pilgrim Watch fails to raise a genuine material dispute with

³⁸ Before the Board, Entergy described that the dose rates used in the Pilgrim SAMA analysis were taken from the guidance manual for the MACCS2 computer code, which Entergy cited in its Environmental Report. See *Entergy Answer Opposing Pilgrim Watch Request for Hearing on a New Contention* (Dec. 27, 2010) (Entergy Answer on Cleanup Contention) at 8; MACCS2 User’s Guide at 7-8. The dose rates are based on the EPA “Manual of Protective Action Guides and Protective Actions for Nuclear Incidents” (May 1992). See Entergy Answer on Cleanup Contention at 8 n.14. At oral argument on the contention, Entergy counsel described the standard as allowing a maximum dose of 2 rem in the first year and 0.5 rem in each of the next four years. See Transcript (Mar. 9, 2011) at 846; MACCS2 User’s Guide at 7-8.

³⁹ Petition at 23.

⁴⁰ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-56 (1989).

the analysis that was done. Its petition does not point to any ground—technical or legal—for the claim that Entergy “did not conduct a valid [SAMA] cost-benefit analysis.”⁴¹

Pilgrim Watch states that its contention “offered two solutions” to the inter-agency matters discussed in the *Inside EPA* article: (1) deny the license renewal application unless and until all matters discussed in the article have been definitively resolved; or (2) require the SAMA analysis to be redone in the “far more conservative” manner the Cleanup Contention “suggested.”⁴² But again, the contention contains merely Pilgrim Watch’s own unsupported suggestions of alternate inputs or methodology for the SAMA analysis. Pilgrim Watch does not specify or otherwise discuss the inputs, factors, or standards the Pilgrim SAMA analysis actually considered. Moreover, Pilgrim Watch’s apparent claim that the NRC must “require” Entergy to implement “all possible” mitigation alternatives is inconsistent with NEPA, which neither requires nor authorizes the NRC to order implementation of mitigation measures analyzed in an environmental analysis.⁴³

Pilgrim Watch’s failure to provide adequate basis and support by itself is sufficient to require rejection of the contention. But Pilgrim Watch also suggests no error in the Board’s finding that all of the technical aspects of the SAMA analysis that Pilgrim Watch now seeks to challenge could have been challenged earlier.⁴⁴ Entergy’s Environmental Report, for example, described how the Pilgrim SAMA analysis source terms were derived, identified the source term

⁴¹ Petition at 23. Pilgrim Watch also provides no support for its claim that “if EPA is in charge” of decontamination efforts in the event of an actual severe accident, there would be an “overall longer time period” in the “decision-making process,” leading to “increase[d] overall costs.” *Id.* at 24.

⁴² *Id.*

⁴³ See, e.g., *Methow Valley Citizens Council*, 490 U.S. at 353.

⁴⁴ See LBP-11-20, 74 NRC at ___ (slip op. at 20 n.93) (citing Entergy Answer on Cleanup Contention at 7-11; *NRC Staff’s Answer in Opposition to Pilgrim Watch’s Request for Hearing on New Contention* (Dec. 23, 2010), at 11).

release fractions, described the use of discount rates, and also indicated that mean accident consequence values were used.⁴⁵ Further, Entergy states that in May 2007 it provided Pilgrim Watch the set of all inputs used in the SAMA analysis, including the cleanup dose levels.⁴⁶

In short, Pilgrim Watch's challenge to the inputs and methodology in the SAMA analysis is impermissibly late under our standards in section 2.309(f)(2),⁴⁷ and is, in any event,

⁴⁵ See, e.g., Entergy Answer on Cleanup Contention at 7-11; Entergy Brief at 3-4.

⁴⁶ See Entergy Answer on Cleanup Contention at 8. Additionally, Pilgrim Watch acknowledged that one of its own cited references in its original intervention petition, a Sandia National Laboratories report from 1996, described "disagreement regarding which agency is responsible for cleanup" and "no agreed upon cleanup standard." See *Pilgrim Watch Reply to Entergy's and NRC Staff's Answers Opposing Pilgrim Watch Request for Hearing On a New Contention* (Jan. 7, 2011), at 8. See also SAND96-0957, D. Chanin, et. al, Site Restoration: Estimation of Attributable Costs from Plutonium-Dispersion Accidents (May 1996) at B-1 to B-11 (addressing different potential "criteria for cleanup," including the dose rates from the EPA Protective Action Guides).

⁴⁷ See LBP-11-20, 74 NRC at ___ (slip op. at 20 n.93) (citing Entergy and Staff briefs before Board). The standard for new or amended contentions involves a balancing of eight factors:

- (i) good cause, if any, for failure to file on time;
- (ii) the nature of the requestor's/petitioner's right under the AEA to be made a party;
- (iii) the nature and extent of the requestor's/petitioner's property;
- (iv) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) the availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) the extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

See 10 C.F.R. § 2.309(f)(2).

The factor given the most weight among these standards is whether the intervenor has shown "good cause" for the late filing. See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 323 (2010). Pilgrim Watch's petition does not identify a "good cause" for the late SAMA claims. Further, given the lack of support for the SAMA
(continued . . .)

unsupported. The *Inside EPA* article and attached e-mails neither render Pilgrim Watch's various SAMA analysis suggestions timely, nor otherwise provide the necessary factual or legal support for them. The Cleanup Contention therefore does not point to any material deficiency—any NEPA violation—in the SAMA analysis. Pilgrim Watch's petition fails to identify error or abuse of discretion in the Board's rejection of the Cleanup Contention.

In rejecting the contention, the Board additionally found that Pilgrim Watch had not met, nor even addressed, our standards for reopening the evidentiary record.⁴⁸ Pilgrim Watch takes the position that it did not need to address the reopening standards. While it is unnecessary to reach the reopening standard issue in regard to the Cleanup Contention (given the contention's lack of support and untimeliness under § 2.309(f)(2)), we nonetheless address Pilgrim Watch's arguments on reopening later in this decision, following our discussion of Cables Contention 2.

C. Cables Contention 2

In December 2010, Pilgrim Watch filed Cable Contention 1, challenging Entergy's AMP for "non-environmentally qualified (EQ) inaccessible cables and cable splices."⁴⁹ The contention claimed that the AMP was "insufficient to provide reasonable assurance that these cables will be in compliance with NRC regulations and public health and safety shall be protected during license renewal."⁵⁰ Pilgrim Watch claimed that the contention was timely because the "information upon which this contention [was] based did not become available" until December

input/methodology claims, it is not evident that Pilgrim Watch's participation would "reasonably be expected" to assist in developing a sound technical or legal record for the SAMA claims.

⁴⁸ See LBP-11-20, 74 NRC at __ (slip op. at 12-16, 20-21).

⁴⁹ See Cables Contention 1 at 1. Section 50.49 sets forth particular requirements for the environmental qualification of electric components important to safety for nuclear power plants. Electric equipment important to safety but located in a "mild environment" does not fall within the scope of this rule. See 10 C.F.R. § 50.49(c). A mild environment "would at no time be significantly more severe than the environment that would occur during normal plant operation, including anticipated operational occurrences." See *id.*

⁵⁰ Cables Contention 1 at 1.

2, 2010, when the NRC issued NRC Information Notice 2010-26 on submerged electrical cables.⁵¹

The Board rejected Pilgrim Watch's Cables Contention 1 as impermissibly late under our contention admissibility rule, and additionally for failure to satisfy the requirements for reopening the evidentiary record.⁵² The Board stated that Pilgrim Watch had "plainly concede[d]" that Entergy's January 2006 license renewal application addressed aging management of inaccessible cables, yet Pilgrim Watch filed its cables contention nearly five years later.⁵³ The Board rejected Pilgrim Watch's argument that Information Notice 2010-26 provided "new information" constituting good cause for the late filing.⁵⁴ Citing our decision in *Vermont Yankee*, the Board stated that the Information Notice "merely summarized information" that had long been publicly available.⁵⁵

Pilgrim Watch does not appeal dismissal of Cables Contention 1. Pilgrim Watch describes Cables Contention 1 as "superseded" by Cables Contention 2, which read as follows:

Entergy's Aging Management Plan (*as amended by Entergy on January 7, 2011*) for non-environmentally qualified (EQ) inaccessible cables and cable splices at Pilgrim Station is insufficient to provide reasonable assurance that these cables will be in compliance with NRC Regulations and public health and safety will be protected during license renewal.⁵⁶

Pilgrim Watch claimed that two new documents rendered Cables Contention 2 timely:

(1) an updated version of the Generic Aging Lessons Learned (GALL) Report, a guidance

⁵¹ *Id.* at 34. See also NRC Information Notice 2010-26, Submerged Electrical Cables (Dec. 2, 2010) (ML102800456).

⁵² See LBP-11-20, 74 NRC at ___ (slip op. at 21-23).

⁵³ *Id.* at ___ (slip op. at 21).

⁵⁴ *Id.* at ___ (slip op. at 22).

⁵⁵ See *id.* (citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC ___, ___ (Mar. 10, 2011) (slip op. at 13)).

⁵⁶ Cables Contention 2 at 1 (emphasis in original).

document for license renewal, containing the NRC Staff's revised section on non-EQ inaccessible cables (Section XI.E3); and (2) Entergy's January 2011 supplement to its license renewal application, based on the revised GALL Report.

Entergy's supplement included amendments to the AMP for non-EQ medium-voltage inaccessible cables, essentially heightening the monitoring of the cables.⁵⁷ Among other enhancements, Entergy's revised AMP increases the frequency of testing and inspections. The enhanced program includes commitments to test inaccessible cables at least once every six years (an increase over the earlier commitment of at least once every ten years), and to inspect cable manholes at least yearly (an increase over the earlier commitment of at least every other year).⁵⁸ The scope of the program also increased, and now includes low-voltage cable between 400V to 2kV.⁵⁹

In support of Cables Contention 2, Pilgrim Watch raised many of the same or similar claims that it had raised in support of Cables Contention 1. Pilgrim Watch claimed that the amended AMP is deficient because (1) the program "ignores cables carrying less than 400 Volts"; (2) inspections of cables, although more frequent than those in the original AMP, "remain too infrequent"; (3) the AMP did not specifically address recommendations made in a 1996 Sandia National Laboratories report and a 2010 Brookhaven National Laboratory study; (4) Entergy "never commits to . . . replacing non-EQ cables exposed to any submergence"; and (5) although the AMP includes a commitment to use a "proven method" for detecting cable degradation, there is no "proven" technology to detect cable and splice degradation due to

⁵⁷ See *id.* at 25, 53-54. See also "Generic Aging Lessons Learned (GALL) Report," NUREG-1801 (Rev. 2 Dec. 2010) (ML103490041), at XI.E3-1 to XI.E3-4; Bethay, Stephen J., Entergy, letter to NRC, Att. 1, License Renewal Application Supplemental Information (Jan. 7, 2011) (ML110200058), at 8-10 (revising §§ A.2.1.21 and B.1.19 of the license renewal application) (LRA Supplement).

⁵⁸ See LBP-11-20, 74 NRC at ___ (slip op. at 27) (citing LRA Supplement).

⁵⁹ See *id.*

periodic submergence in a saltwater and otherwise chemically contaminated environment.”⁶⁰

Pilgrim Watch argued that all cables “exposed to any submergence must be replaced with cables designed and qualified for underwater operation.”⁶¹ Pilgrim Watch further claimed that, despite Entergy’s amendments to the AMP, the program “remains woefully insufficient.”⁶²

The Board rejected Cables Contention 2 as untimely both under our rule for new and amended contentions, and our standard for reopening the record.⁶³ The Board stressed that “every single objection” to the amended AMP “could (and therefore should) have been raised at the outset of this proceeding as an objection to the AMPs set out in the original” license renewal application, submitted in January 2006.⁶⁴ The asserted “shortcomings are not new today,” the Board explained.⁶⁵

Pilgrim Watch did not suggest, for example, that any of Entergy’s revisions to the AMP made the program weaker or introduced a deficiency that was new. On the contrary, Pilgrim Watch described the new AMP as an improvement over than the original program.⁶⁶ In Pilgrim Watch’s view, the revised GALL Report and AMP simply did not go far enough. As the Board stated, the complaint in Cables Contention 2 was that the asserted deficiencies “*remain[ed]*” in

⁶⁰ See generally Cables Contention 2 at 28-48.

⁶¹ *Id.* at 29 (quoting Blanch Affidavit at 37).

⁶² *Id.* at 28.

⁶³ See LBP-11-20, 74 NRC at ___ (slip op. at 24-30).

⁶⁴ See *id.* at ___ (slip op. at 28-29).

⁶⁵ See *id.* at ___ (slip op. at 29 n.123).

⁶⁶ At oral argument, Pilgrim Watch’s representative stated, for example, that the revised AMP “is a little better” than the original, “but it doesn’t do the trick” because there is “still . . . no requirement” to replace the cables. See Tr. at 800; *Pilgrim Watch Reply to Entergy’s and NRC Staff’s Answers Opposing Pilgrim Watch Request for Hearing* (Jan. 14, 2011) at 4 (“Entergy’s new AMP may be marginally better than its original one . . . [but] remains deficient.”).

the amended AMP, not that any of the claimed deficiencies were new or otherwise weakened the originally proposed AMP.⁶⁷

Because the Board found that Pilgrim Watch's claims in Cables Contention 2 did not genuinely stem from the specific amendments to the AMP (or from particular information in the revised GALL Report), the Board concluded that the contention was untimely both under our standards for admission of new or amended contentions (10 C.F.R. § 2.309(f)(2)) and under our standards for reopening the evidentiary record (10 C.F.R. § 2.326(a)(1)).⁶⁸

On appeal, Pilgrim Watch's arguments on timeliness do not point to any Board error or abuse of discretion.⁶⁹ Pilgrim Watch's petition nowhere suggests how any of the asserted deficiencies set forth in the contention are based on new information revealed in the revised GALL Report or amended AMP, or otherwise could not have been raised at the outset of this proceeding. Because the claims in Cables Contention 2 do not stem from the changes Entergy made in the AMP, the amended AMP did not provide "good cause" for the late-filed contention.⁷⁰

⁶⁷ LBP-11-20, 74 NRC at ___ (slip op. at 25) (emphasis in original). See also Cables Contention 2 at 28.

⁶⁸ LBP-11-20, 74 NRC at ___ (slip op. at 26 & n.115).

⁶⁹ See, e.g., Petition at 9 n.9 (addressing the standards for "non-timely filings" listed in 10 C.F.R. § 2.309(c)). See also 10 C.F.R. § 2.309(f)(2) (specifying standards for late-filed contentions, which must show that the information upon which the new contention is based "was not previously available," and is "materially different than information previously available"). Among the 8 factors considered in § 2.309(c), the factor "accorded the greatest weight" is whether there was "good cause" for the failure to file a timely contention. See *Watts Bar*, CLI-10-12, 71 NRC at 323. Absent "good cause," there must be a "compelling showing on the remaining factors"; it is a "rare case where we would excuse a nontimely petition absent good cause." See *id.* Pilgrim Watch does not present a compelling case. See generally Petition at 9 n.9.

⁷⁰ See 10 C.F.R. § 2.309(c); Petition at 9. Contrary to Pilgrim Watch's view (see Petition at 8), the Board did not misread our decisions in *Vermont Yankee* and *Oyster Creek*. See LBP-11-20, 74 NRC at ___ (slip op. at 28) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 273-74 (2009) *aff'd*, *N.J. Env't'l Fed'n v. NRC*, 645 F.3d 220, 230 (3d Cir. 2011) ("the NRC reasonably determined that if AmerGen's enhanced monitoring program was insufficient, it must have been insufficient beforehand too"). See also *Vermont Yankee*, CLI-11-2, 73 NRC at ___ (slip op. at 8-10). The point is not that contentions cannot be based on amended programs containing enhancements, but that new or amended (continued . . .)

We therefore discern no error in the Board's conclusion that the contention is late under both 10 C.F.R. §§ 2.309(c) and 2.326(a)(1)).

Indeed, Pilgrim Watch raised many of the same cable-related claims in an enforcement petition filed in July 2010, pursuant to 10 C.F.R. § 2.206.⁷¹ The § 2.206 petition addresses both the current Pilgrim license term and the renewal term. In the petition, Pilgrim Watch states that it "did not learn about this [inaccessible cables] issue in time to file a contention or request reopening the hearing" in the license renewal proceeding.⁷² At oral argument on the cables

contentions must be *based on new facts* not previously available. Here, Cables Contention 2 is not actually challenging the amendments—the enhancements—to the AMP, and therefore is not based on any new information.

While Judge Young (in a separate opinion) found the contention timely, she relies on a flawed reading of our decision in *Vermont Yankee*. See LBP-11-20, 74 NRC at ___ (slip op. at 8-12) (Young, J., concurring in part and dissenting in part). Judge Young suggests that we found a cables-related contention untimely in *Vermont Yankee* because the petitioner had neither moved to reopen the record nor requested leave to amend its contention to challenge the licensee's updated and enhanced AMP for cables. Judge Young refers, however, to a portion of our decision focused not on timeliness, but on whether the Board caused prejudice to the intervenor by considering the licensee's supplement to the application, which contained the updated AMP. See *id.* at ___ (slip op. at 9, 11). We concluded that there was no prejudice because the intervenor could have sought to amend its contention to respond to the supplement. See *Vermont Yankee*, CLI-11-2, 73 NRC at ___ (slip op. at 14). Our point was only that if the intervenor believed that the application supplement actually presented some new or additional deficiency—some new harm to the intervenor—the intervenor could have filed an amended contention. Our statements addressing whether the Board's actions constituted prejudice in no way diminished the decision's clear conclusion on timeliness: "[t]he tardy filing of a contention may be excusable only where *the facts upon which the amended or new contention is based* were previously unavailable." See *id.* at ___ (slip op. at 13) (emphasis added). We did not suggest that it is appropriate to file amended contentions only to raise claims that are not based on genuinely new information. Because the intervenor in the case did not submit an amended contention, we did not prejudice what the full content of such a contention might have been.

⁷¹ See "Re: Pilgrim Watch 2.206 Petition Regarding Inadequacy of Entergy's Management of Non-Environmentally Qualified Inaccessible Cables & Wiring at Pilgrim Station" (July 19, 2010) (ML1020900241) (Pilgrim Watch Enforcement Petition). The 2.206 petition has been held in abeyance, pending the disposition of Pilgrim Watch's contentions on inaccessible cables. See *generally* McGinty, Timothy J., Office of Nuclear Reactor Regulation, NRC, letter to Mary Lampert, Pilgrim Watch (May 31, 2011) (ML111160334) (NRC Letter Re: 2.206 Petition).

⁷² Pilgrim Watch Enforcement Petition at 7.

contentions, Pilgrim Watch's representative acknowledged the § 2.206 petition. She explained that although Pilgrim Watch has known about the submerged cables issue for some time, it "didn't bring [the issue] forward in 2006 . . . because there is only so much we could have dealt with," and that the various NRC actions taken over several years regarding the monitoring of inaccessible cables had given Pilgrim Watch the impression that the NRC "was going to actually regulate and make some requirements on something" the NRC had considered "for over a decade."⁷³

Pilgrim Watch describes disappointment with Information Notice 2010-26 as the reason behind its filing of the cables contentions. Pilgrim Watch states that it had expected that the NRC would "require the industry" to take particular actions, but was disappointed that the Information Notice imposed no requirements.⁷⁴ But this is effectively a complaint that the NRC failed to take enforcement or other regulatory oversight action, a matter appropriate for a § 2.206 petition, which Pilgrim Watch has filed. Pilgrim Watch's dissatisfaction with the Information Notice does not render its contention timely.

Similarly, one of Pilgrim Watch's central assertions is that all cables that experience any submergence must be replaced with cables qualified for underwater use. While Pilgrim Watch argues that cable inspections "remain too infrequent," it appears more to be claiming that inspections are altogether inadequate and that the relevant cables must be replaced with

⁷³ See Tr. at 797-98, 877 (because NRC had addressed issue of submerged cables "over and over again in information notices" Pilgrim Watch expected NRC would impose new "requirements," but it "didn't happen"). See also *Pilgrim Watch Reply to NRC Staff's Answer to Pilgrim Watch's Request for Review* (Sept. 12, 2011), at 4 ("all of the papers that NRC Staff and Entergy cite to show why everyone should have known of this problem led Pilgrim Watch to assume that the NRC would seriously address the issue") (Reply to Staff).

⁷⁴ See Reply to Staff at 4. See also *Reply to Entergy's and the NRC Staff's Oppositions to Pilgrim Watch's Request for Hearing on a New Contention* (Feb. 24, 2011), at 8-10 (PW Reply to Entergy and Staff/Cables Contention 2).

environmentally qualified cables under 10 C.F.R. § 50.49.⁷⁵ It is Pilgrim Watch's claim that *right now*—not simply in the renewal term—there are submerged cables in violation of § 50.49. This claim of a current regulatory violation is a matter appropriately addressed by the Staff in the context of Pilgrim Watch's pending enforcement petition. If the Staff were to find any current violations of our safety regulations, such findings also would apply, as appropriate, to the license renewal term.⁷⁶

D. Reopening Standards

For both the Cleanup Contention and Cables Contention 2, the Board additionally found that Pilgrim Watch had not satisfied the standards for reopening a closed record. Pilgrim Watch argues that the reopening standards did not apply to either contention, and that in any event, it satisfied those standards for Cables Contention 2.

Pilgrim Watch identifies no basis for revisiting the Board's conclusions. At the time that Pilgrim Watch filed the cleanup and cables contentions, the only matter before the Board was a limited issue from Contention 3 that we had remanded.⁷⁷ The Board earlier had dismissed Contention 3 on summary disposition, and then held a hearing on Contention 1, ultimately issuing a decision in favor of Entergy, and terminating the proceeding before it.⁷⁸ In short, when the Board declared the proceeding "terminated," there was no question that the Board considered the *entire* evidentiary case record closed.

⁷⁵ See Blanch Affidavit at 37 ("there is no technical justification for periodicity of inspections").

⁷⁶ The § 2.206 petition review process encompasses both "current or future safety issues." See NRC Letter Re: 2.206 Petition at 2.

⁷⁷ See CLI-10-11, 71 NRC at 290 ("remanding Contention 3, as limited by today's ruling" to the Board).

⁷⁸ LBP-08-22, 68 NRC at 610.

Our later remand of a limited portion of Contention 3 to the Board did not have the effect of reopening the evidentiary case record to a host of unrelated new issues. We expressly confined the matters remanded to the Board; the evidentiary record otherwise had been closed.

Accepting Pilgrim Watch's arguments would mean that whenever we remand an issue to the Board—no matter how limited the issue and no matter how long since the Board resolved all other admitted matters—no party would ever need to file a motion to reopen the record, so long as it presented contentions raising completely new issues.⁷⁹ Such a conclusion does not square with the purpose of the reopening standard, which is intended to impose a “deliberately heavy” burden on parties seeking to supplement the evidentiary record at the 11th hour, after the record has closed.⁸⁰ Had we not remanded any matter to the Board, the full evidentiary record would have remained closed, just as it was closed pending our decision. Our limited remand did not have the broader, collateral effect of setting aside altogether the need to satisfy the reopening standards for seeking further hearings on entirely new contentions.

Pilgrim Watch's argument that the reopening standard only applies to matters previously admitted and not to contentions raising new issues is contradicted by the reopening rule and its Statements of Consideration.⁸¹ In rejecting a similar argument, the U.S. Court of Appeals for the Third Circuit recently stated that an exception for situations where parties “seek to add previously unlitigated material would effectively render the [reopening] regulation meaningless.”⁸² The purpose of the rule is to raise the threshold—increase the showing

⁷⁹ See *generally* Petition at 3-5.

⁸⁰ See, e.g., *Vermont Yankee*, CLI-11-2, 73 NRC at ___ (slip op. at 5).

⁸¹ See 10 C.F.R. § 2.326(d); Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538-39 (May 30, 1986) (rejecting commenter's view that standard should only apply to “an issue already considered”).

⁸² See *N.J. Env't'l Fed'n*, 645 F.3d at 233.

necessary—for last-minute claims for additional hearings. The rule provides no exception for previously unlitigated issues.

Pilgrim Watch goes on to argue that while it did not file a motion to reopen the record for either the Cleanup Contention or Cables Contention 2, the latter “in fact, meets the reopening standard, as argued by Judge Young in [her] separate statement.”⁸³ But again, Pilgrim Watch identifies no error warranting review of LBP-11-20.

The standards for reopening the case record require the movant to show that the motion is timely, addresses a significant safety or environmental issue, and demonstrates that “a materially different result would be or would have been likely had the newly proffered evidence been considered initially.”⁸⁴ The rule further requires an affidavit setting forth “the factual and/or technical bases” for the above criteria, each of which “must be separately addressed, with a specific explanation of why it has been met.”⁸⁵ In submitting Cables Contention 2, Pilgrim Watch neither filed a motion to reopen the record, nor addressed the criteria in the reopening rule. Pilgrim Watch simply stated that the reopening rule did not apply.⁸⁶ Mr. Blanch’s affidavit also did not address the reopening rule’s criteria.

Pilgrim Watch argues that it nonetheless also had claimed, in the alternative, that its filing effectively provided sufficient information to satisfy the reopening standards.⁸⁷ But the

⁸³ Petition at 2.

⁸⁴ See 10 C.F.R. § 2.326(a)(1)-(3). An untimely issue “may be considered in the discretion of the presiding officer” if the issue is “exceptionally grave.” See 10 C.F.R. § 2.326(a)(1).

⁸⁵ 10 C.F.R. § 2.326(b).

⁸⁶ Cables Contention 2 at 58-59.

⁸⁷ See *Petition* at 7. Pilgrim Watch refers to its reply to Entergy and the Staff, in which Pilgrim Watch stated that its “request for hearing is *not* a motion to reopen, and even if it were[,] Pilgrim Watch’s request meets the standards for reopening—it is timely and addresses a significant safety issue.” PW Reply to Entergy and Staff/Cables Contention 2 at 2 (emphasis in original). The reply went on to stress, however, that Pilgrim Watch was not “attempt[ing] to show that a ‘materially different result would be or would have been likely had the newly proffered evidence (continued . . .)

majority ruled otherwise and we can discern no basis to revisit that conclusion. One, the majority found the contention untimely under 10 C.F.R. § 2.326(a)(1), concluding that Pilgrim Watch's objections to the AMP did not actually stem from Entergy's amendments to the AMP, but raised matters that could and should have been raised years ago.⁸⁸ The majority acknowledged that the timeliness requirement in § 2.326(a)(1) provides an exception for matters deemed "exceptionally grave." But it found Mr. Blanch's statements on the gravity of the cables issue "simply conclusory" and "speculative."⁸⁹ The Board majority found no basis to conclude that Contention 2 presented an issue posing an "exceptionally grave" threat to public safety.⁹⁰ Pilgrim Watch gives us no reason to revisit these conclusions.

The exception for "exceptionally grave" safety matters is intended to be used "only in truly extraordinary circumstances."⁹¹ Here, the Staff has found Entergy's amended AMP to be consistent with the NRC's revised GALL Report, a guidance document for license renewal.⁹² The Staff revised the GALL Report's discussion of inaccessible cables based on its reviews of industry operating experience and cable failure data. Pilgrim Watch does not dispute that Entergy's amended AMP complies with the GALL Report—rather, it disputes the sufficiency of the GALL Report's recommendations. While compliance with the GALL Report does not shield

been considered" because its claims did not relate to earlier admitted contentions. See *id.* at 3. To the extent that Pilgrim Watch now claims that it demonstrated to the Board the likelihood of a materially different result, Pilgrim Watch impermissibly raises a new argument for the first time on appeal.

⁸⁸ LBP-11-20, 74 NRC at __ (slip op. at 24-30).

⁸⁹ *Id.* at __ (slip op. at 30 n.125).

⁹⁰ *Id.*

⁹¹ See Criteria for Reopening Records, 51 Fed. Reg. at 19,536.

⁹² See Safety Evaluation Report, Related to the License Renewal of Pilgrim Nuclear Power Station, Supplement 2, Docket No. 50-293 (June 2011) at 3-4 (ML11147A036) (finding program consistent with GALL Report, current staff recommendations, and industry operating experience).

the amended AMP from challenge, it is relevant to whether the amended AMP credibly may be so deficient that it presents an “exceptionally grave” safety threat to the public.⁹³ Further, a July 2010 NRC inspection report attached to the contention found a performance deficiency of “very low safety significance” and identified no regulatory violation.⁹⁴

“Reopening will only be allowed where the proponent presents material, probative evidence which either could not have been discovered before or could have been discovered but is so grave that, in the judgment of the presiding officer, it must be considered anyway.”⁹⁵ These are the requirements reflected in § 2.326(a)(1). Based on the record before us, we discern no error in the Board’s judgment that these requirements were not met, which by itself is sufficient to defeat an effort to re-open a hearing record.

While we need not reach any further element of the reopening rule, one point bears clarification. Pilgrim Watch, relying on Judge Young’s separate opinion, argues that to demonstrate under § 2.326(a)(3) that a “materially different result” would have been likely, all that is necessary is to demonstrate that “there are genuine facts in dispute.”⁹⁶ Pilgrim Watch then goes on to list “disputed material facts” regarding the sufficiency of the amended AMP, and

⁹³ We have stated that a “license renewal applicant’s use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period.” *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 468 (2008). *See also Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 37 (2010). Given that the GALL Report reflects agency guidance and is not a rule, this is merely a presumption; the sufficiency of an AMP that meets the GALL Report’s recommendations can be challenged if the contention admissibility requirements are otherwise met.

⁹⁴ *See* Cables Contention 2, Attachment 4, NRC Integrated Inspection Report 05000293/2010003 (July 20, 2010).

⁹⁵ Criteria for Reopening Records, 51 Fed. Reg. at 19,538.

⁹⁶ *See* Petition at 14.

therefore to claim that Pilgrim Watch showed that a “materially different result” would have been likely because “Pilgrim Watch . . . could defeat a motion for summary disposition.”⁹⁷

But the reopening standard is not the equivalent of a summary disposition standard. While we have said that the quality of the evidence presented for reopening must be at least of a level sufficient to withstand a motion for summary disposition,⁹⁸ we also have made clear that the reopening standard requires more.⁹⁹ The motion must “demonstrate that a materially different result would be . . . *likely* had the newly proffered evidence been considered initially.”¹⁰⁰ The Statements of Consideration clarify that reopening should not be granted where a Board merely “is uncertain whether or not the new evidence is important.”¹⁰¹ The proper inquiry under § 2.326(a)(3) goes to “the *likelihood* that a different result will be reached if the information is considered.”¹⁰² This appropriately requires the Board to consider the information in the submitted supporting affidavits. While the Board does not reach an ultimate decision on the merits of the contention, it nonetheless must apply its expertise and make a record-based judgment on the evidence. The evidence must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate results in the proceeding.¹⁰³ To meet the reopening standard, then, it is insufficient merely to point to disputed facts.

While we agree with Judge Young’s admonition not to “elevate[] form over substance,” it is not obvious to us from Pilgrim Watch’s petition or the record before us that there is a

⁹⁷ See *id.* (quoting Judge Young’s Separate Statement at 31).

⁹⁸ See, e.g., *Vermont Yankee*, CLI-11-2, 73 NRC at __ (slip op. at 15-16).

⁹⁹ See *Oyster Creek*, 68 NRC 658, 673-74 (2008).

¹⁰⁰ See 10 C.F.R. § 2.326(a)(3) (emphasis added).

¹⁰¹ Criteria for Reopening Records, 51 Fed. Reg. at 19,537.

¹⁰² *Id.* (emphasis added).

¹⁰³ See *N.J. Env’tl Fed’n*, 645 F.3d at 234 (rejecting argument that it was impermissible for Board and Commission to weigh evidence in evaluating whether rule standards are met).

likelihood that Pilgrim Watch would prevail on the merits of Cables Contention 2. Nor did Judge Young make such a finding. We therefore cannot say that the Board majority erred in its overall conclusion that Pilgrim Watch did not “supply the necessary substance” to satisfy the re-opening standards, particularly when many of Mr. Blanch’s statements in his affidavit are conclusory, lacking adequate references and support, and the attached Information Notice 2010-26 and July 2010 inspection report on their face are insufficient to suggest that Pilgrim Watch likely would prevail on the merits.¹⁰⁴

E. Pilgrim Watch’s Additional Memoranda

Pilgrim Watch additionally argues that that Board “failed to consider new, significant and material information from Fukushima and information regarding whether there are ‘proven’ tests to determine degradation in cable insulation.”¹⁰⁵ Pilgrim Watch refers to several memoranda it filed before the Board after the oral argument on the cleanup and cables contentions. Two of the memoranda claimed that Entergy officials gave “incorrect and misleading information” regarding tests to detect cable insulation.¹⁰⁶ The other three memoranda referenced the Fukushima accident.¹⁰⁷

¹⁰⁴ We need not and do not reach whether the contention raises a “significant” safety issue, an additional element necessary for meeting the re-opening standard. See 10 C.F.R. § 2.326(a)(2). We note only that a “significant” issue is not shown “merely by showing that a plant component performs safety functions.” See *Oyster Creek*, CLI-08-28, 68 NRC at 672 (internal quotation and citation omitted).

¹⁰⁵ Petition at 2.

¹⁰⁶ See *Pilgrim Watch Memorandum—Entergy’s Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation* (Apr. 11); *Pilgrim Watch Memorandum—Entergy’s Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation—Video Supplement* (Apr. 12, 2011). Pilgrim Watch’s petition additionally references *Pilgrim Watch Memorandum—Submerged Cables* (June 23, 2011), which we reviewed but consider of no relevance to today’s decision.

¹⁰⁷ See *Pilgrim Watch Memorandum Regarding Fukushima* (Mar. 12, 2011); *Pilgrim Watch Post-Hearing Memorandum* (Mar. 28, 2011); *Pilgrim Watch Request for Leave to Supplement Pilgrim Watch Request for Hearing on the Inadequacy of Entergy’s Aging Management Program of* (continued . . .)

The Board briefly addressed the five memoranda, stating that none had any “bearing” on its conclusions.¹⁰⁸ More specifically, the Board found that none of the memoranda were sufficiently linked to, or otherwise provided grounds for admission of, either the Cleanup Contention or Cables Contention 2.¹⁰⁹

Setting aside the fact that Pilgrim Watch’s “memoranda” are not filings contemplated by our rules of practice, it is not apparent to us how any of the memoranda present “new, significant and material information” directly supporting admission of Pilgrim Watch’s contentions. The two memoranda asserting that Entergy officials gave incorrect information—a point Entergy disputes—do not render the cable contention timely, for example; nor are the memoranda sufficient to satisfy other contention admissibility requirements. If it is Pilgrim Watch’s argument that Entergy has violated a regulation or enforcement action is necessary, such a claim can be pursued through an enforcement petition; as we earlier noted, Pilgrim Watch’s enforcement petition relating to inaccessible cables is pending.

The memoranda on the Fukushima accident contain cursory, generalized statements that likewise present no obvious ground to admit either contention. That a “basic cause of the Fukushima disaster was the loss of offsite power, due to the Tsunami”¹¹⁰ is undisputed, and does not by itself suggest that Entergy’s AMP for inaccessible cables is deficient under our regulations. Nor do the memoranda provide any ground for redoing the Pilgrim SAMA analysis. Pilgrim Watch neither points to a specific genuine material dispute with the Pilgrim SAMA

Non-Environmentally Qualified Cables (Splices) at Pilgrim Station, filed on December 10, 2010 and January 20, 2011 (Aug. 8, 2011).

¹⁰⁸ See LBP-11-20, 74 NRC at ____ (slip op. at 10-11 n.61).

¹⁰⁹ *Id.* at ____ (slip op. at 19, 23).

¹¹⁰ See March 28 Memorandum at 2.

analysis, nor with Entergy's license renewal application.¹¹¹ We note, additionally, that Pilgrim Watch has had the opportunity to file, and has filed, new contentions based on the Fukushima accident.¹¹²

Our general assessment of Pilgrim Watch's various memoranda in no way suggests that we do not take very seriously the events at Fukushima, particularly whether information arising from the accident may point to procedural or hardware changes that should be implemented at U.S. reactors. As we outlined earlier this year, we continue to comprehensively assess the accident at Fukushima, including a careful review of all recommendations outlined by the NRC's Task Force studying the accident.¹¹³ This extensive review is likely to result in new regulations

¹¹¹ To the extent that Pilgrim Watch in its petition presents new claims not made in the memoranda, these claims are raised impermissibly for the first time on appeal given that the Board never had the opportunity to consider them. In any event, Pilgrim Watch's petition identifies no basis for admission of its contention or other agency action. See Petition at 20-21; Entergy Brief at 23 n.51.

¹¹² See *Pilgrim Watch Request for Hearing on Post Fukushima SAMA Contention* (May 12, 2011); *Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima* (June 1, 2011); *Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima* (Nov. 18, 2011). The Board recently concluded that these contentions failed to meet relevant agency standards. See LBP-11-23, 74 NRC __ (Sept. 8, 2011) (slip op.); *petition for review denied*, CLI-12-3, 75 NRC __ (Feb. 22, 2012) (slip op.); LBP-12-1, 75 NRC __ (Jan. 11, 2012) (slip op.). Pilgrim Watch's petition for review of LBP-12-1 is pending before us.

After the Board issued LBP-11-20, Pilgrim Watch also filed a memorandum before us, a request to "supplement the record" with a report by Congressman Edward Markey. This filing and the referenced report also have no obvious bearing on the admissibility of either contention at issue here—the Markey Report relates to internal NRC governance. See *Pilgrim Watch's Request to Supplement Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions) August 11, 2011 (Filed August 26, 2011)* and *Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident) Sept. 8, 2011 (Filed September 23, 2011)* (Dec. 12, 2011). More recently, Pilgrim Watch filed an additional "supplement" to the record, containing a news article on decontamination efforts in Japan. See *Pilgrim Watch's Supplement to Pilgrim Watch Petition for Review of LBP-11-20* (Mar. 6, 2012). The supplement does not contain any information that might change the reasoning or conclusions in this decision.

¹¹³ See generally *Union Electric Co d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC __ (Sept. 9, 2011) (slip op.).

as well as orders to licensees; our regulatory processes provide opportunities for stakeholder input. For the license renewal safety review, it is not clear at this point “whether any enhancements or changes considered by the Task Force will bear on our *license renewal* regulations,” which are focused more narrowly on the proper management of aging.¹¹⁴ As for our NEPA-based evaluations, if “new and significant information comes to light” that is relevant to ongoing “application-specific NEPA documents,” the NRC will evaluate the information as appropriate.¹¹⁵ We will address any new information presenting “a seriously different picture of the environmental impact of the proposed project” than previously assessed.¹¹⁶ At this stage, however, our review of the Fukushima accident events is ongoing and remains insufficient to conclude whether any aspects of the *Pilgrim* license renewal environmental analysis may warrant supplementation. We reaffirm that no information we have learned so far from the Fukushima accident puts into question the “continued safety of our currently operating regulated facilities, including reactors and spent fuel pools.”¹¹⁷

¹¹⁴ See *id.* at ____ (slip op. at 26).

¹¹⁵ See *id.* at ____ (slip op. at 31-32).

¹¹⁶ See *id.* at ____ (slip op. at 31) (internal quotation and citation omitted).

¹¹⁷ See *id.* at ____ (slip op. at 22).

III. CONCLUSION

For reasons given in LBP-11-20 and in this decision, we *deny* Pilgrim Watch's petition for review.

IT IS SO ORDERED.¹¹⁸

For the Commission

[NRC SEAL]

/RA/

Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of March 2012

¹¹⁸ Commissioner Apostolakis did not participate in this matter.